Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ENRIQUE AVALOS-BARRIGA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT IMPERMISSIBLY AMENDED A STATUTE WHEN IT INSTRUCTED THE JURY ON ONE OF THE ELEMENTS OF TITLE 21 U.S.C. § 848(a)(2)(A), BY REPLACING THE EXPLICIT "IN CONCERT WITH" STATUTORY LANGUAGE WITH ITS OWN IMPROVISED PHRASE – "TOGETHER WITH"?

II. WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE *SAME* THREE VIOLATIONS CONSTITUTING THE "CONTINUING SERIES OF VIOLATIONS" REQUIREMENT OF § 848(a)(2)?

III. WHETHER THE APPELLATE COURT SANCTIONED A VIOLATION OF THE ESTABLISHED RULES FOR TITLE 28 U.S.C. § 2255 PROCEEDINGS BY ADOPTING THE DISTRICT COURT'S DIVINING THAT TRIAL COUNSEL HAD A "TRIAL STRATEGY" WHERE THE RECORD YIELDS ABSOLUTELY NO SUCH EVIDENCE?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Enrique Avalos-Barriga, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 21, 2001.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals affirming Petitioner's conviction was filed on October 16, 2001 and was unpublished; a copy of this Opinion is included in Appendix A. The appellate court's Memorandum Opinion affirmed the district court's order entered on July 6, 2000 denying Petitioner's motion to set aside his conviction and sentence because of ineffective assistance of counsel under 28 U.S.C. § 2255. The district court's Order is included in Appendix B. On December 21, 2001 the Court issued an Order denying Petitioner's request for Rehearing and his petition for rehearing *en banc*. This Order is included as Appendix B.

JURISDICTION

On October 16, 2001 the Ninth Circuit Court of Appeals entered its opinion affirming the district court's denial of his Title 28 U.S.C. § 2255 motion to set aside his conviction. The appellate court had jurisdiction pursuant to Title 28 U.S.C. §§ 1291 and 2253(a). See, Appendix A. Then, on December 21, 2001 the Court of Appeals denied

a Petition for Rehearing and rejected a Suggestion for Rehearing En Banc. See, Appendix B. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty or property without due process of law. . . .

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the Assistance of Counsel for his defense. . . .

STATUTES INVOLVED IN THIS CASE

The text of Title 21 U.S.C. § 848(a) and (c)(2)(A) is reproduced in Appendix D herein.

STATEMENT OF THE CASE

1. Petitioner was sentenced to life in prison for his conviction for, *inter alia*, conducting a Continuing Criminal Enterprise (CCE) in violation of 21 U.S.C. § 848. He thereafter challenged his conviction and sentence in his *habeas corpus* motion alleging ineffective assistance of counsel in numerous areas. See, Appendix A, pages App. 1-2; and, Appendix B, pages App. 5-6.

One of the critical issues where Petitioner alleged ineffective assistance was in trial counsel's failure to object to the jury instructions on the CCE charge. In instructing the jury, the trial court ignored, *inter alia*, the explicit wording of the statute – the "in concert with" requirement at § 848(a)(2)(A) – and replaced it with its own phrase "together with." See, Appendix A, page App. 4.

However, the district court's Order denying Petitioner's motion under Title 28 U.S.C. § 2255 alleging ineffective assistance of counsel in this area, failed to consider the jury instructions issues presented by Petitioner because it concluded that no prejudice could be established because of the concurrent sentence doctrine. Petitioner was also convicted of conspiracy to possess cocaine with intent to distribute and received a concurrent life sentence; regrettably, the district court failed to note that this conviction and concurrent sentence were vacated by the appellate court pursuant to *Rutledge v. United States*, 517 U.S. 292 (1996). See, Appendix B, page App. 14.

2. In his *habeas* motion, Petitioner also raised the jury instruction defect connected to the "continuing series of violations" element of § 848(a)(2). This issue was also not considered by the district court because of the concurrent sentence doctrine. See, Appendix B, page App. 14.

On appeal, he argued that the jury instructions only required a unanimous finding that Petitioner committed three or more felony drug violations, whether or not they were charged or prosecuted as a violation of the federal narcotics laws.

Although the court instructed the jury that they must unanimously agree on the three offenses constituting the series of violations, that was not the functional equivalent of this Court's holding in *Richardson v. United States*, 526 U.S. 813, 815-16 (1999) – that the jury is required to unanimously agree on the *same* three offenses that make up the continuing series of CCE predicate violations. Here again, the appellate court simply held – "The instructions regarding the unanimity requirement and the number of people involved appeared consistent with the statutory elements." See, Appendix A, page App. 4. *Richardson* was never even mentioned by the appellate court.

3. Petitioner also argued that he suffered from ineffective assistance of counsel in various other areas of his jury trial. See, Appendix B, page App. 5-6. An evidentiary hearing was held on other contested issues wherein Petitioner's trial counsel testified for the government. Appendix B, page App. 6 and Note 1. At the hearing, counsel was never asked by the government or the court about any tactical or strategic objectives he may have had at trial to explain the various acts described by Petitioner as ineffective. Therefore, the record bears no evidence at all that counsel had any specific strategy or tactic in doing the actions challenged by Petitioner. The district court simply noted in its Order that "The trial and sentencing errors raised by [Petitioner] have been considered on the papers." Appendix B, page App. 6, Note 1.

The appellate court held, without a basis on the record, that – "Trial counsel's decisions during trial were reasonable, **given his trial strategy** and evidence presented by the Government." See, Appendix A, page App. 3 (emphasis added). As noted above, there was absolutely

no evidence on the record what, if any, "trial strategy" counsel employed.

REASONS FOR GRANTING THIS PETITION

I.

THE TRIAL COURT IMPERMISSIBLY AMENDED A STATUTE WHEN IT INSTRUCTED THE JURY ON ONE OF THE ELEMENTS OF TITLE 21 U.S.C. § 848(a)(2)(A), BY REPLACING THE EXPLICIT "IN CONCERT WITH" STATUTORY LANGUAGE WITH ITS OWN IMPROVISED PHRASE – "TOGETHER WITH."

This novel Continuing Criminal Enterprise (CCE) issue arises from the trial court's instruction to the jury regarding one of the elements of the statute – the "**in concert with** five or more" element required by Title 21 U.S.C. § 848(a)(2)(A). (Emphasis added). Here, instead of instructing the jury on the elements of § 848, by faithfully reading the explicit language of the statute, the trial court inexplicably created its own phrase – "together with" – as a substitute. In so doing, the trial court radically departed from the acceptable judicial procedure.

On appeal, the Ninth Circuit Court of Appeals remarkably opined – "The language 'together with' **is not so different** from 'in concert with' as to make the instructions noticeably incorrect." Appendix A, Memorandum Order at App. 3 (emphasis added).

Title 21 U.S.C. § 848 provides, in relevant part:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) Which are undertaken **in concert with** five or more other persons with respect to whom such person occupies a position of organizer, a supervising position, or any other position of management, and
>
> (B) From which such a person obtains substantial income or resources.

(Emphasis added). See, *Richardson v. United States*, 526 U.S. 813, 815-16 (1999).

In *Richardson*, this Court noted – "Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime." See, *Richardson* at 817. Here, in instructing the jury on the elements of the offence at issue, the trial court replaced, without objection from counsel, the phrase "in concert with" with its own variation – "together with." The appellate court reviewing this issue stated "The language 'together with' **is not so different** from 'in concert with' as to make the instructions noticeably incorrect." Appendix A, Memorandum Order at App. 3 (emphasis added).

What the appellate court missed here was that the district court was materially altering the very wording of the statute and diminishing the burden of proof upon the government. The usage and legal meanings of the two phrases are indeed materially different: "in concert with" includes a knowing, meeting-of-the-minds conspiratorial participation; whereas, "together with" simply describes physical presence without any conspiratorial requirement.

Black's Law Dictionary defines the word "Concert" with the following example: "A person is deemed to act in concert when he acts with another to bring about some **preconceived** result." Black's Law Dictionary, Fifth Edition (1979) (emphasis added). "Concerted Action" is further defined as "Action that has been **planned, arranged, adjusted, agreed on and settled between parties** ***acting together*** pursuant to some design or scheme." (Emphasis added). The definition of "Concerted Action" in Black's is instructive because it just happens to contain the lesser-included and obviously incomplete "acting together" language unfortunately injected here by the district court. Black's defines "Together" as "In union with, along with"; quite less descriptive than the other two definitions!

Therefore, the jury was left on its own to determine what "together with" meant and was impermissibly allowed to find guilt on the CCE count with a lesser burden than that constitutionally required. *Griffin v. United States*, 502 U.S. 46 (1991); *Keating v. Hood*, 191 F.3d 1053 (9th Cir. 1999); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *In Re Winship*, 397 U.S. 358 (1970).

A passenger in a car driven across the international border by a driver who knows that drugs are secreted in the car may indeed be in the car "together with" the driver but is not necessarily transporting the secreted drugs "in concert with" the driver. The Ninth Circuit has already held that mere presence at the scene, or while "together with" one committing a crime, is insufficient for conviction. See, *United States v. Estrada-Macias*, 218 F.3d 1064 (9th Cir. 2000) (mere presence at the site and even knowledge that drug manufacturing was taking place are insufficient to convict for conspiracy to manufacture methamphetamine); *United States v. Pinkney*, 15 F.3d 825, 827 (9th Cir 1994) (mere presence is insufficient for conspiracy); *United States v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991) (a person's mere knowledge of drugs and mere presence at the scene was insufficient for a conspiracy).

In all of these "mere presence" cases, it can be said that the defendants were convicted because each defendant was "together with" the others who committed the respective crimes in each case. But it can easily be said that the appellate court reversed the convictions because they were not acting "in concert with" the principals in each case. Why should the improvised phrase "together with" be allowed in this case risking a jury's conviction on nothing more than a "mere presence" standard of proof?

The appellate court considering this judicial statutory redrafting issue failed to appreciate that what the district court was doing here was unadulterated *ad hoc* statutory drafting and changing legislative language expressly disapproved by this Court in *McNally v. United States*, 483

U.S. 350 (1987). The "in concert with" statutory language was meant to be a phrase of art and not merely a fungible suggestion. The phrase itself has a specific legal definition as can be noted from Black's Law Dictionary. Had it been intended for the phrase to be fungible, the statute would have included the phrase -"or any such language that the trial court deems appropriate"! Judges are not to be allowed to improvise on carefully and laboriously drafted statutes by choosing whatever language, at the time, comes close enough to it.

The improvised jury instructions given by the trial court also required only a unanimous finding that Avalos committed three or more violations of the federal narcotics law. The jury was not required to agree that three offenses were committed while acting "in concert with five or more other persons."

The omission of the "in concert" element in the court's CCE charge, not only constructively amended the indictment, it also failed to require a unanimous verdict of guilty beyond a reasonable doubt, as to each of the essential elements of the § 848 (CCE) violation, and thus, rendered the instructions constitutionally deficient.

Because the appellate court never reached the issue actually raised in this case, it never applied a prejudice analysis on this specific issue required by this Court's rulings in *Chapman v. California*, 386 U.S. 18 (1967), *Neder v. United States*, 527 U.S. 1, 27-53 (1999) and *Rutledge v. United States*, 517 U.S. 929 (1996).

The clear appearance of this case is that, in this country, a court, by "mere will" and fiat, inexplicably decide to ignore the specific language and words of art

required by a duly enacted statute to replace them with its own determination of what "satisfies [the court's] private conscience" at that time. See, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1950). And, that an appellate court, whose duty is to enforce the laws and oversee the actions of lower courts, has allowed statute drafting by dismissing a defendant's claim of error as a mere technicality. Far more is involved in the case at bar and the far larger picture should be regarded.

The wisdom of Justice Frankfurter eloquently articulated in different but surreally similar times (October term 1950) may now be trampled upon in the name of expediency. In *McGrath*, during the McCarthy shame of our country, Justice Frankfurter also stated:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That **a conclusion satisfies one's private conscience** does not attest its reliability. The **validity and moral authority** of a conclusion largely depend **on the mode by which it was reached**. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, **so important to a popular government**, that justice has been done.

McGrath, at 171-172 (emphasis added). The "mode by which" Petitioner's conviction "was reached" – the belief that the statutory language required here was somehow

unnecessary – *inter alia*, leaves in doubt the "validity and moral authority" of the conclusion reached here.

II.

THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE ON THE *SAME* THREE VIOLATIONS CONSTITUTING THE "CONTINUING SERIES OF VIOLATIONS" REQUIREMENT OF § 848(a)(2).

In *Richardson*, this court cautioned as follows:

> The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion **of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do**. The second consideration significantly aggravates the risk (present at least to a small degree **whenever multiple means are at issue**) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke, there must be fire.

Richardson at 819 (emphasis added). This passage from *Richardson* is instructive in the case at bar considering that the district court also eliminated the "in concert" requirement.

Here, for example, the government incorporated into Count 2, (the CCE count) the conspiracy charge in Count 1, and further alleged: "Enrique Avalos-Barriga did

knowingly and intentionally engage in a continuing criminal enterprise by violating various provisions of the Controlled Substance Act (Title 21, United States Code, Section 841, 846, 952, 960 and 963) as alleged in overt acts 1-79 of Count 1 of this indictment, which offenses were part of a continuing series of violations of the Controlled Substance Act."

To prove that Petitioner committed the continuing series of predicate violations, the government did not merely present the jury with three eligible predicate acts, but instead presented evidence of 79 overt acts allowing the jury to pick those offenses it felt met the proper definition – despite the fact that Petitioner was not alleged to be involved in over 50% of those violations and despite the fact that many of the alleged 79 overt acts, alleged money wire transfers and traveling in interstate and foreign commerce to distribute drug proceeds.

Therefore, the trial court's failure to instruct the jury that they had to unanimously agree on the *same* three offenses constituting the continuing series is contrary to the holding in *Richardson*, and would have allowed Petitioner to be convicted of the CCE offense, for example, if six jurors had unanimously agreed that overt acts 1-3 were the continuing series of violations and the other six jurors unanimously agreeing that acts 4-7 represented the continuing series.

Furthermore, where the jury is presented with offenses that do not qualify as a predicate offense, to support the continuing series requirement, as a matter of law the jury needed to be instructed on this point.

Here, the jury was allowed to consider 79 overt acts the government had alleged as the continuing series of CCE predicate offense to prove the continuing series for the CCE violation. Of the 79 overt acts, Petitioner was only named in 34 of them. 18 of those overt acts alleged that he traveled in interstate or foreign commerce to deliver drug proceeds, or wire transfers or drug proceeds. Those offenses do not qualify as eligible underlying offenses for CCE.

In the case at bar, out of the 79 alleged continuing series of CCE predicate violations the jury was allowed to consider, 67 do not apply. Therefore, the trial court's failure to instruct the jury with respect to which three specific violations, and that they must unanimously agree about which specific "violations" made-up that "continuing series," was reversible error.

III.

WHETHER THE APPELLATE COURT SANCTIONED A VIOLATION OF THE ESTABLISHED RULES FOR TITLE 28 U.S.C. § 2255 PROCEEDINGS BY ADOPTING THE DISTRICT COURT'S DIVINING THAT TRIAL COUNSEL HAD A "TRIAL STRATEGY" WHERE THE RECORD YIELDS ABSOLUTELY NO SUCH EVIDENCE.

The Ninth Circuit here, in the face of a barren record on the point at issue in this Title 28 U.S.C. § 2255 ineffective assistance case, simply opines – "Trial counsel's decisions during trial were reasonable, **given his trial strategy** and evidence presented by the Government." Appendix A, page App. 3 (emphasis added). Unfortunately, the record is absolutely devoid of any evidence

that trial counsel had any "trial strategy" at all. In this respect, review is essential because the appellate court has sanctioned a significant departure from accepted and usual course of judicial proceedings.

Similarly, the appellate court concluded – "Trial counsel's **strategy concerning how to challenge the Government's case** was also not deficient." Appendix A, page App. 3 (emphasis added). The appellate goes on to merely articulate, without the facts in the actual record, that trial counsel's "failure to object to the Government's" false claims that Petitioner, and not "Chapo" Guzman as alleged in the indictment, was the "kingpin" here, counsel's total failure to impeach a critical non-informant witness with available impeaching material, and other shortcomings by trial counsel were simply "reasonable."

The finding, out of whole cloth, by the appellate court that trial counsel worked from a "trial strategy" is a significant departure from the accepted and usual course of judicial proceedings. The proper remedy should have been to remand for a hearing on whether such facts could be determined at the district court level where trial counsel could be summoned again to testify. Whether or not counsel acted with a certain "trial strategy" or not is a critical fact never established here. This Petition should be granted because the appellate court has deviated from accepted practice to such an extent as to make up facts to deny Petitioner meaningful appellate review.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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